Filed 7/27/12 In re C.B.D. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re C.B.D. et al., Persons Coming Under the Juvenile Court Law.	
MARIN COUNTY HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. C.D., Defendant and Appellant.	A132559, A132864 (Marin County Super. Ct. Nos. JV25114A, JV25115A)

C.D. (Mother), mother of 15-year-old A.M., 7-year-old C.B.D., and 2-year-old C.D., appeals from the juvenile court's orders denying her petition under Welfare and Institutions Code section 388 (388 petition) and terminating her parental rights to C.B.D.[1] Mother previously filed a petition under California Rules of Court, rule 8.452 to set aside the juvenile court's order setting a permanency hearing under section 366.26 (366.26 hearing) for all three children, and we affirmed the order as to C.B.D. and C.D. (April 22, 2011, A130664).[2] In this appeal, Mother contends the juvenile court erred in:

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated. A.M. has been placed with her father and is not a party to this appeal.

[2] We vacated the order as to A.M. on the ground that a permanency hearing was not appropriate for her because she was being placed with her father and was not scheduled to be adopted or placed in a legal guardianship or long-term foster care. (A130664, pp. 20-

(1) summarily denying her 388 petition; and (2) terminating her parental rights to C.B.D. because the sibling relationship exception applied. We reject the contentions and affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

First opinion

We hereby summarize the jurisdictional and dispositional facts that are set forth in more detail in our first opinion. "The Marin County Department of Health and Human Services (the Department) filed an original petition on July 7, 2010, alleging Mother inflicted serious physical harm on A.M. and C.B.D. and subjected them to cruelty, placed C.D. at substantial risk of being abused or neglected, and left all three children without any provision for support." (A130664, p. 2.) "Mother hit A.M. and C.B.D. with 'a spatula and wooden spoon causing visible traumatic injuries including, but not limited to, bruising and swelling' to various parts of their bodies including their faces, arms and legs. She placed A.M. in a headlock, choked her and punched her in the face and nose, causing A.M. to suffer a 'clinically broken nose.' She cut A.M.'s hair with a pair of scissors as A.M. struggled to get away, then shaved off her hair and threatened to kill her if she called the police or told anyone of the abuse. Mother held C.B.D. 'upside down by one foot, and threw him onto a sofa, causing his head to hit the end of the arm rest. [She] then slapped [C.B.D.] across the face as he appeared unconscious and listless, and not responding to [her] calls. [She] then proceeded to cut [C.B.D.'s] clothes off with a pair of scissors, rendering him naked, grabbed him by the penis, pulled [him] upwards, and continued to strike him with a wooden spoon.' " (A130664, p. 2.) "Mother had a history of 12 referrals in three counties, one of which involved an allegation that she abused her younger sisters and 11 of which involved allegations of abuse or neglect of her children." (*Ibid*.) She had been offered various services since 2001. (A130664, pp. 2-3.)

21.) To obtain context, maintain consistency and economize judicial resources, we take judicial notice of our prior opinion and the record in the prior matter. (See Evid. Code, § 451, subd. (a); *In re Luke L.* (1996) 44 Cal.App.4th 670, 674, fn. 3.)

The juvenile court detained the children on July 8, 2010. (A130664, p. 5.) Mother, who had pleaded guilty to two counts of assault and battery with a deadly weapon, "expressed some remorse for her actions . . . but [stated] that she did not 'remember much of what happened.' She ' "felt awful" ' about what she did to A.M. but ' "couldn't take it because [A.M.] would be rude." ' . . . Her blood alcohol level was .26 when she was arrested and the detoxification process took a week. Mother said she used alcohol as a way to 'self soothe' and as a 'reward as she fe[lt] that with the children she never ha[d] time for herself.' Mother said she did not believe alcohol affected her parenting because she did not drink until night time when the children were asleep." (A130664, pp. 6,7.)

"The Department recommended bypassing reunification services to Mother and scheduling a . . . 366.26 hearing. Mother had previously been offered approximately 19 months of court mandated services but had failed to utilize skills she had learned or maintain progress she had made. A.M. had expressed distress and concern about Mother hurting her and her siblings, and C.B.D. 'stated quite clearly that he need[ed] his mother to be removed from him [in order for him] to be safe.' Mother had pleaded guilty to and was convicted of 'two violent felony counts,' and the children had suffered and/or were at risk of suffering severe abuse. The Department believed it was unlikely that the successful completion of an alcohol treatment program would preserve the children's lives, safety and well being." (A130664, pp. 8-9.)

At a contested jurisdictional and dispositional hearing, A.M. testified in detail regarding the incidents of abuse, including how Mother hit her in the face, arms and hands, punched her in the head and nose while threatening to break her nose, choked her, forced her to take a cold shower while taunting her and cut, then shaved off, her hair, made her clean up the hair, and called her names. (A130664, pp. 10-11.) Mother attacked C.B.D. by, among other things, repeatedly hitting him and knocking him down for saying he was hungry, choking him as she counted to five after he responded he was five years old, following him into his room and "body slamm[ing] him . . . into the couch," slapping him hard in the face when he was limp and not moving, and cutting his clothes off with scissors. (A130664, pp. 10-11.)

"The juvenile court took jurisdiction over the children and set the matter for a . . . 366.26 hearing as to all three children. It found the incidents of July 4 and 5, 2010, caused the children severe emotional harm and that providing reunification services to Mother would not be beneficial to the children because it would expose them 'to a parent who has a history of serious alcohol abuse, culminating in an alcoholic rage over the July 4th weekend' and to 'a parent who may have psychological problems stemming from her own abusive childhood.' The court noted that Mother had received various services in the past, including alcohol education and parenting classes, and that those services had 'made no difference.' The court temporarily placed A.M. with her father . . . [and] further ordered that C.B.D. and C.D. be removed from Mother's custody and that reunification services to Mother be denied." Mother challenged the orders and we affirmed the order setting a 366.26 hearing as to C.B.D. and C.D., concluding there was substantial evidence supporting the findings that the children were subjected to acts of cruelty and that Mother was not entitled to reunification services. (A130664, pp. 16-19.)

Instant appeal

C.D. and C.B.D. had been living together in a fost-adopt home since July 2010 but C.B.D. was removed from that home in April 2011 after the family determined they were no longer able to care for him. C.B.D. was placed in an emergency foster home, then moved to a new fost-adopt home on May 11, 2011. Mother had been having supervised visits with C.D. on a regular basis. She was playful and appropriate with C.D. and the visits had been going well. C.D. was generally more distressed leaving her fost-adopt mother and visit supervisors than she was leaving Mother.

In March 2011, C.D.'s alleged father, D.P., appeared for the first time. After a paternity test determined D.P. was C.D.'s biological father, the juvenile court found D.P. was C.D.'s presumed father and ordered reunification services and visitation for him. D.P. visited with C.D. for the first time on April 12, 2011, and acted appropriately with her. According to a report dated June 6, 2011, the Department had assessed the home of D.P. and his girlfriend and had found it clean and spacious and appropriate for C.D. D.P. and his girlfriend wanted C.D. to live with them and had a plan for supporting her. On

June 27, 2011, the juvenile court ordered that C.D. be placed with D.P. after a transition period and ordered a six-month family maintenance plan for D.P. It also ordered that Mother have two monthly supervised visits with C.D.

The Department filed 366.26 reports recommending that the court terminate Mother's parental rights to C.B.D. and order adoption as his permanent plan. C.B.D. was in good health, not on any medications, developmentally on target, and doing well in school. He was active and easily excitable but his previous fost-adopt mother was "able to redirect him without too much trouble." "Despite [C.B.D.'s] history of abuse and neglect and his recent placement disruption," he was "generally doing well." He expressed "great disappointment and intense emotions about no longer living with his previous fost-adopt family," but continued to talk about wanting a "forever family" and did not spontaneously speak of Mother. Based on the previous fost-adopt family's reports that C.B.D. was exhibiting sexualized behavior and severe tantrums, additional services were being provided and C.B.D. had responded positively to treatment. He had also been working with two therapists to overcome the abuse and neglect he had suffered. Mother had had no visits with C.B.D. because C.B.D. had not asked to see her and his therapist believed visitation would be detrimental to his well being.

The Department described C.B.D. as a "very sweet, lovable child who is attached to his siblings . . . ." "The siblings have a stable and solid sibling bond, one that will need continued nurturing. Despite the abuse and early childhood trauma [C.B.D.] has had to endure at the hands of his biological mother, he has overcome many issues and has developed into a sensitive and loving little boy." His new fost-adopt family was committed to the long term plan of adoption. The family was vigilant about keeping up with medical appointments, did not delay in getting him into therapy, and was aware of his needs. After a few weeks, C.B.D. asked his fost-adopt parents if he could call them "mom" and dad," and he looked to his new family for guidance and reassurance. The Department believed that another family could be located if his fost-adopt family was, "for some unforeseen reason," unable to adopt him.

On June 27, 2011, Mother filed a 388 petition requesting, among other things, reunification services, increased visitation with C.D., and therapeutic visits with C.B.D. She asserted she had "made tremendous progress and growth in addressing [her] alcohol problems and [had] remained clean and sober for one year . . . ." The juvenile court summarily denied the petition, finding Mother had not shown a prima facie basis to set aside prior orders.

At the 366.26 hearing, the social studies reports were admitted into evidence and several witnesses testified. A social worker testified about C.B.D.'s fost-adopt home, confirmed C.B.D.'s strengths as outlined in the reports, and testified about his strong relationship with his fost-adopt family. She further testified that C.B.D. had visited with A.M. and C.D., which he said was "really fun." C.B.D. also had phone contact with A.M. once a week and was visiting C.D., who was living with her father. Another social worker testified that she observed a visit between C.B.D. and C.D. and that the children appeared to be having fun. C.B.D. also had positive visits with A.M. before she moved to her father's place, and he still had weekly contact with her, during which A.M. sometimes read stories to C.B.D. over the phone.

Mother introduced a report from a social worker for Adopt a Special Kid, who had observed C.B.D. to be very attached to A.M. during a visit. Mother also called Dr. Catherine Main to testify regarding C.B.D.'s bonding with his siblings and the benefit of maintaining his relationship with Mother. Dr. Main testified it was "probably difficult for [C.B.D.]" not to see his siblings with whom he had grown up, and that it was "certainly a loss." It was important for his self image to maintain his relationships with his siblings because it would remind him that he is "thought of and cared about and loved by people that have been in his life since he was born." She also believed that a therapeutic visit with Mother would be beneficial because it would "help him to hear from the source, which is his mother, that she's the one that's solely responsible and that he, in no way, caused what happened to him . . . ." She also believed there was "an attachment that exists between [him] and his mother," and that "even if it's an insecure attachment, it still exists." Dr. Main testified that when she met with C.B.D., he said he missed Mother sometimes but

responded "no" when asked whether he wanted to see her. She believed C.B.D.'s therapists were the ones best able to answer whether he was ready to "handle a visit with his mother." Dr. Main agreed that ultimately, C.B.D. being "in a permanent home and feeling safe and trusting people [wa]s paramount," and that the greater benefit would come from him having a stable home, compared to the benefit of having a sibling relationship.

Mother testified she had been clean and sober for a year and was seeing a therapist. She believed C.B.D. was very bonded to his siblings and that it was important for the children to maintain contact, as they had grown up together and had a connection. She knew she had done something horrible and that it was her fault. She wished to be a part of healing her son. Her friend Cheryl M., who had known Mother since Mother was four years old, testified that she had taken care of the children and that C.B.D. and C.D. adored each other. C.B.D.'s Court Appointed Special Advocate told the court that she wanted "C.B.D. to have a permanent adoptable home as soon as possible."

After hearing testimony and argument, the juvenile court terminated Mother's parental rights to C.B.D., finding there was clear and convincing evidence that C.B.D. was adoptable and that the benefit to C.B.D. in maintaining his sibling relationship or relationship with Mother was outweighed by his need for permanency. The court also noted as to the 388 petition, "In listening to the testimony that I've heard today from [Mother], as well as from Dr. Main, even if I had granted the 388 hearing, I would not have grant[ed] the relief. I don't think your client was prejudiced by the denial of the hearing."

On July 1, 2011, Mother filed a notice of appeal challenging the juvenile court's orders regarding C.B.D.'s placement.[3] (Case A132559.) On July 27, 2011, Mother filed a second notice of appeal from the orders denying her 388 petition and terminating her parental rights to C.B.D. (Case A132864.) We consolidated the two appeals on November 4, 2011.

[3] Mother states on appeal that she "is not pursuing issues arising out of the placement hearing in Case No. A132559."

DISCUSSION

Summary denial of 388 petition

Mother contends the juvenile court erred in summarily denying her 388 petition because she had shown a prima facie case for an evidentiary hearing. Assuming, without deciding, that this issue is not moot as the Department argues it is,[4] we conclude there was no error.

Section 388, subdivision (a), provides in relevant part: "Any parent . . . [of] a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . ." To obtain an evidentiary hearing on a 388 petition, the parent must plead facts sufficient for a prima facie showing that: (1) the circumstances have changed since the prior juvenile court order; and (2) the proposed modification will be in the best interests of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) Factors to be considered in determining what is in the best interests of a child under section 388 include: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

Here, the problems that led to the dependency were egregious, as Mother engaged in numerous acts of cruelty towards A.M. and C.B.D. in front of C.D. as set forth above and in our prior opinion. As to the relative strength of bonds, the Department noted in its 366.26 report that C.D. did not show any distress at the end of visits with Mother as a normally bonded toddler would, and in fact showed more distress when leaving her then-foster mother. A therapist opined that C.D. had a very strong attachment to her former foster parents with whom she had been living until she was placed with her father. Although Mother testified regarding her bond with C.B.D., C.B.D. did not wish to see her

[4] The Department states, "Mother's section 388 argument is moot because the underlying action has been dismissed and no effective relief can be granted."

and was eager to find a "forever family." Dr. Main referred to C.B.D.'s relationship with Mother as an "insecure attachment," and C.B.D.'s therapist believed that visitation with Mother would be detrimental to his well-being. In contrast, C.B.D. was bonded to his former and new fost-adopt families, called his new fost-adopt parents "mom" and "dad," and looked to them for guidance and reassurance.

Finally, as the court noted, "The circumstances of the abuse were exacerbated by Mother's continued alcohol abuse despite having received alcohol education after being involved in an accident while driving under the influence with C.B.D. in the car. Mother had a history of 11 past referrals over the course of ten years involving abuse and neglect of her children. She had a criminal history that involved convictions for violent acts of battery and willful cruelty to a child. She received various services including case management, individual counseling, parenting classes, referrals for drug testing, and referrals to community resources, yet continued to abuse her children." "Once a case has advanced to the permanency planning stage, it is important not only to seek an appropriate permanent solution, but also to implement that solution promptly to minimize the time the child is in legal limbo and to allow the child's caretakers to make a full emotional commitment to the child." (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1513.) Although Mother had made some progress in addressing her issues, the problems that led to the dependency were not likely to be—and had not been—"removed or ameliorated." (See *In re Kimberly F., supra*, 56 Cal.App.4th at p. 532.)

Mother asserts the juvenile court nevertheless should have granted her request for an evidentiary hearing because she had shown a change of circumstances, and "[b]est interests can be implied from a change of circumstance." (See, e.g., *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416.) "It is not enough," however, "for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 529.) "The fact that the parent 'makes relatively last-minute (albeit genuine) changes' does not automatically tip the scale in the parent's favor." (*In re D.R., supra,* 193 Cal.App.4th at p. 1512.) Although Mother showed she had participated

in residential treatment and had been sober for one year, the reasons for removal—her long history of physical and emotional abuse—were unresolved. While Mother's attempts at rehabilitation are commendable, " '[a] petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]' ' "[C]hildhood does not wait for the parent to become adequate." ' " (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court did not err in summarily denying Mother's 388 petition.

Sibling relationship exception to termination of parental rights

Mother contends the juvenile court erred in terminating her parental rights to C.B.D. because the sibling relationship exception applied. We disagree.

Although there is a strong preference for adoption as the permanent plan for dependent children who are unable to reunify with their parents, there are statutory exceptions to the rule where the court "finds a compelling reason for determining that termination would be detrimental to the child . . . ." (§ 366.26, subd. (c)(1)(B).) Section 366.26, subdivision (c)(1)(B)(v), provides an exception to termination of parental rights when termination would substantially interfere with the child's sibling relationship and the severance of the relationship would be so detrimental to the child as to outweigh the benefits of adoption. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-953.)

In determining whether the sibling relationship exception applies, the juvenile court "must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 951.) The court first determines "whether terminating parental rights would substantially interfere with the sibling relationship by evaluating the nature and extent of the relationship, including whether the child and sibling were raised in the same house, shared significant common experiences or have existing close and strong bonds." (*Id.* at pp. 951-952.) "If the court determines terminating parental rights would substantially interfere with the sibling relationship, the court is then directed to weigh the

child's best interest in continuing that sibling relationship against the benefit the child would receive by the permanency of adoption. (*Id.* at p. 952.) "[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount." (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014.)

Here, assuming C.B.D. shared a significant bond with his siblings, we conclude the juvenile court did not err in finding that the sibling relationship exception did not apply. Dr. Main stated in her report, "It is imperative that he receives the stability and love he requires in a permanent home environment as soon as possible." She testified that "be[]ing in a permanent home and feeling safe and trusting people [wa]s paramount" for C.B.D. and agreed that the greater benefit would come from his having a stable home, compared to the benefit of maintaining his relationship with his siblings. Moreover, there was evidence that C.B.D. was thriving in his fost-adopt home. The 366.26 report stated he had become a part of the family "quickly and effortlessly" and that the fost-adopt family was attentive to his needs and excited to help him and share their love and wisdom with him. After a few weeks, C.B.D. asked his fost-adopt parents if he could call them "mom" and "dad," which made the fost-adopt parents very happy. C.B.D. "stated, 'I love my new home (with emphasis on love),' [and] spontaneously said he wanted to live there forever." C.B.D.'s Court Appointed Special Advocate, who had spent 171 hours on the case, recommended that adoption be the permanent plan for him. Under these circumstances, valuing C.B.D.'s continuing relationship with his siblings over adoption would have deprived him of the ability to belong to a "forever family," and would not have been in his best interests.

Mother argues the juvenile court improperly relied on the fost-adopt family's "unenforceable promise of future visitation" in finding the sibling relationship exception did not apply and terminating her parental rights. However, she does not cite to anything in the record indicating the court relied on such an "unenforceable promise."[5] Rather, the court found that the benefit to C.B.D. of maintaining his sibling relationship was "so

[5] In fact, she acknowledges that "the court recognized in this case" that it could not require the fost-adopt parents to agree to sibling visits.

outweighed for his need for permanency that [it was] not [a] determinative factor[] in not terminating parental rights." In other words, it found that even if termination of parental rights resulted in C.B.D. not being able to maintain his sibling relationships, it was still in his best interests to place him in a permanent, adoptive home.[6]

DISPOSITION

The juvenile court's orders are affirmed. In light of our decision, we hereby deny the Department's motion to dismiss the appeal in part and its request for judicial notice of—or in the alternative, to augment the record with—documents that purport to support their position that the juvenile court's orders should be affirmed.

_____
McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Siggins, J.

[6] Finally, Mother complains that the adoption assessment report was inadequate because it "omitted any information concerning [C.B.D.'s] sibling relationships and the amount and nature of any contact he was having with them . . . ." However, any deficiencies in the assessment report were insignificant in light of the fact that sufficient evidence was presented at the 366.26 hearing to enable the court to evaluate whether the sibling relationship exception applied. (See *In re Crystal J.* (1993) 12 Cal.App.4th 407, 413 [any deficiencies go to the weight of the evidence and may prove insignificant unless they are so egregious as to undermine the court's permanent plan decision].)